

**Letter of Findings Number: 09-0231**  
**Individual Income Tax**  
**For the Year 2007**

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**ISSUES**

**I. Individual Income Tax – Imposition.**

**Authority:** IC § 6-3-3-12; IC § 6-8.1-6-3; *Nell v. Tracy*, 459 N.E.2d 432, 435 (Ind. Ct. App. 1984).

Taxpayers protest the assessment of individual income tax.

**II. Tax Administration – Penalty.**

**Authority:** IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayers protest the imposition of interest and penalty for failure to remit individual income tax.

**STATEMENT OF FACTS**

Taxpayers are a married couple. Prior to December 27, 2007, Taxpayers had not established an account with the Indiana College Choice 529 Plan ("529 Plan"). Taxpayers mailed their account registration and contributed two \$2,500 checks to the 529 Plan Administrator. However, the 529 Plan Administrator did not post the checks until early 2008.

On Taxpayers' 2007 individual income tax return, Taxpayers claimed a \$1,000 credit based on the above-referenced contributions. The Indiana Department of Revenue ("Department") disallowed the credit and assessed additional tax that would have been due absent the credit. Taxpayers protested the assessment, the Department conducted an administrative hearing, and this Letter of Findings results.

**I. Individual Income Tax – Imposition**

**DISCUSSION**

Taxpayers protest the disallowance of the credit for contribution to the 529 Plan. In particular, Taxpayers argue that they made the payment during 2007 and the envelope with the payment was postmarked in 2007; therefore, Taxpayers conclude that they relinquished their rights to the funds in 2007 and were eligible for the credit.

IC § 6-3-3-12(i) states:

A taxpayer is entitled to a credit against the taxpayer's adjusted gross income tax imposed by [IC 6-3-1](#) through [IC 6-3-7](#) for a taxable year equal to the least of the following:

- (1) Twenty percent (20 [percent]) of the amount of the total contributions made by the taxpayer to an account or accounts of a college choice 529 education savings plan during the taxable year.
- (2) One thousand dollars (\$1,000).
- (3) The amount of the taxpayer's adjusted gross income tax imposed by [IC 6-3-1](#) through [IC 6-3-7](#) for the taxable year, reduced by the sum of all credits (as determined without regard to this section) allowed by [IC 6-3-1](#) through [IC 6-3-7](#).

Taxpayers also note that the postmark date for their application and check was prior to December 31, 2007, and therefore the postmark date should control. IC § 6-8.1-6-3(a)(1) provides for a postmark date for return, payment, and document submission. However, the postmark date is a provision that applies specifically to submissions to the Department; the language does not provide for the reliance on postmark dates for any other purposes. Furthermore, [IC 6-8.1-6-3\(a\)\(2\)](#) provides for an actual delivery date for other methods of submitting information to the Department. Finally, absent a specific statutory provision, postmark dates are not necessarily applicable for determining the date of document or payment. See *Nell v. Tracy*, 459 N.E.2d 432, 435 (Ind. Ct. App. 1984) (applying a day-after-mailing rule absent a specific statute or other rule).

Nonetheless, Taxpayers have provided sufficient information to conclude that their contributions were in fact made to an account in calendar year 2007, and therefore Taxpayers were eligible for the credit that they claimed for tax year 2007.

**FINDING**

Taxpayers' protest is sustained.

**II. Tax Administration – Penalty.**

**DISCUSSION**

Taxpayers protest the imposition of a ten-percent penalty for failure to remit individual income tax and related interest.

IC § 6-8.1-10-2.1(a) provides:

If a person:

- (1) fails to file a return for any of the listed taxes;

- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;

the person is subject to a penalty.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1(d). The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

With regard to Taxpayers' remaining liabilities, the Department did not assess a penalty on an underpayment due to an issue unrelated to the current protest. Under IC § 6-8.1-10-1, the interest due on that underpayment cannot be waived.

#### **FINDING**

Taxpayers' protest is moot with regard to the penalty and denied with regard to interest otherwise due.

#### **CONCLUSION**

Taxpayers' protest is sustained with regards to the 529 credit disallowance for 2007. Taxpayers' protest of penalty is moot and Taxpayers' protest of the interest is denied with regard to interest otherwise assessed on issues unrelated to the current protest.

*Posted: 06/24/2009 by Legislative Services Agency*

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